122.

No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. ———

J. N. BEAN, W. B. BAINBRIDGE, S. W. BENT, WALLACE BENT and CORBETT BENNETT,

Petitioners,

vs.

W. A. MORRIS and T. N. HOWELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THOMAS J. WALSH,
CORNELIUS B. NOLAN,
GEORGE W. PIERSON,
Of Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

This the petition of J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett respectfully shows unto this Honorable Court, that on the 3rd day of February, 1908, the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, made and entered its decree and judgment, affirming the decree of the United States Circuit Court for the District of Montana, in the case of W. A. Morris, Complainant and Appellee, versus J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett (Appellants), John Sad-

ring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wrote Appellees), Defendants, T. N. Howell, Intervenor, (entitled in the printed transcript on file in the United States Circuit Court of Appeals for the Ninth Circuit, as follows: J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, Appellants, versus W. A. Morris, Complainant and T. N. Howell, Intervenor, and John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young and Michael Wrote, Defendants, Appellees).

That among the questions presented by the record in the said cause and submitted for consideration to the said Circuit Court of Appeals are the following, to-wit:

1. Whether citizens of one state, appropriating water from a stream which has its source in another state, within the state of their residence, for use on lands within such state, may maintain an action in equity in a United States Circuit Court, sitting in the state in which is the source of the stream, to enjoin citizens of that state claiming to have appropriated the waters of the stream under its laws for the irrigation of lands within the state of their resi-

dence from diverting and using for such purposes the same in the state of their residence.

2. Whether, if under ordinary conditions such an action could be maintained, it can be supported in a case in which the citizens of the state, in which are the head-waters of the stream, were denied an opportunity to make earlier appropriations of its waters by reason of the fact that the entire region within which were such head-waters was within an Indian reservation, out of which the stream flowed directly into the state within whose territory and under whose laws the complainant's appropriation was made.

3. Whether in such action (purely in personam if maintainable at all) one who is a citizen of the state in which the action is brought, and of which the defendants are citizens, but who claims to have made an appropriation from the stream in the same state as did the complainant, that is to say, beyond the borders of the state in which the court sits, may be permitted to intervene in the action and try therein the question of priority of right between himself and the defendants, citizens of the same state with him.

4. Whether under a complaint filed in the United States Circuit Court to establish a prior right to the waters of the stream and to enjoin the defendants, appropriators above, from diverting the water of the stream, that court acquires any jurisdiction, when the bill of complaint avers that the water right asserted by the complainant is of the value of $2,000, though it is also averred

that the complainant has been damaged in the sum of $2,500 by reason of the defendants' interferences with his water right.

These important questions of great public interest arise as follows:

On January 20, 1903, W. A. Morris, above named, filed his bill of complaint in the United States Circuit Court for the District of Montana against J. N. Bean, W. R. Bainbridge, Bert Bent, Wallace Bent, Corbett Bennett, John Sadring, L. O. Dilts, Allen P. Graham, William Eley, Curtis Beeler, Charles Ingram, C. Runyan, William Sholtz, C. E. Steele, John Rhodes, F. Banderof, O. S. Erickson, Tillman C. Graham, James Pauley, C. M. Brown, John Bowler, J. A. King, A. Holm, C. H. Young, and Michael Wrote, in which he alleged that he was a citizen of Wyoming, and that in the year 1887 he had in that state appropriated 250 inches, miner's measurement, of the waters of Sage Creek, which he had diverted on to lands then occupied, and at the time of the filing of his bill of complaint owned by him, in the said state of Wyoming, such diversion having been made in the state of Wyoming, though the stream, Sage Creek, has its source in the county of Carbon, State of Montana, through which it flows across the state line into Wyoming. He averred that the defendants, citizens of the State of Montana, had in the irrigating season of the three years prior to the commencement of the suit, in the state of Montana, diverted the waters of Sage Creek at points on the stream above his point of diversion, and had also diverted the

water of Piney Creek, a tributary of Sage Creek, emptying into it above the head of his ditch. Such diversion also it was alleged took place in the state of Montana and resulted in damage to him in the sum of $2,500.

The bill averred that the water right and appropriation claimed by the complainant is of the value of $2,000. He prayed for an injunction enjoining further interference with his right, and for damages in the sum of $2,500.

The petitioners answered denying that the complainant had made any appropriation antedating the month of November, 1895. They admitted the diversion as charged, but denied that complainant had suffered any damage. They further severally alleged appropriations by themselves of the waters of Sage Creek and Piney Creek in the State of Montana, for the irrigation of lands owned or occupied by them in Montana, through ditches in Montana. They set up the defense of estoppel, adverse user and nonuser by the complainant.

After the petitioners had answered, one T. N. Howell, over their objection, was permitted to intervene, the complainant expressly consenting. His petition contained averments of the same general character as those made by the complainant in his bill. He averred a Wyoming appropriation of 6¼ cubic feet per second of the waters of Sage Creek for the irrigation of lands in Wyoming, and declared himself to be a citizen of that state. He asserted a priority of right over the defendants, but admitted the priority of the complainant to the extent 6¼ cubic feet of water

per second. He also prayed for a decree establishing his right, for an injunction, and for damages.

To the petition of the intervenor the petitioners in this court answered in manner similar to the answer made to the bill of complaint. They specifically put in issue the intervenor's allegation of his Wyoming citizenship, and averred that he is a citizen of Montana.

A general replication was filed and the case referred to a master to take testimony. On the incoming of his report the court found that Sage Creek has its source in the Pryor mountains, Carbon County, Montana, and flows in a general southerly direction through a portion of Carbon County, to and across the dividing line between Montana and Wyoming into the last mentioned state, where it falls into the Stinkingwater river, and that the appropriation of the intervenor and that of the complainant were made at a time when all of the territory drained by Sage Creek and its tributaries was a part of the Crow Indian reservation, the south line of which conformed to the south line of the State of Montana. It was further found that the complainant had appropriated 100 inches of the waters of Sage Creek in the year 1887, that the intervenor appropriated 110 inches of water from Sage Creek in 1890, and that the appropriations of the defendants, including those of the petitioners herein, were not made until 1893. The court held against the claim of adverse user, estoppel and abandonment or non-user; held that the citizenship of the intervenor was immaterial, and directed a decree awarding 100 inches of the waters of Sage Creek to the

complainant and 110 inches to the intervenor, enjoining the defendants from diverting so much as that the amount stated could not be obtained from Sage Creek by the complainant and the intervenor respectively, but denying damages. A decree was entered accordingly, and from this decree an appeal was taken to the Circuit Court of Appeals for the Ninth Judicial Circuit, resulting in an affirmance as above stated.

It is insisted in this petition that the Circuit Court of Appeals erred in its judgment and decree herein in the same particulars as did the Circuit Court, and your petitioners here assign that the Circuit Court of Appeals committed error prejudicial to your petitioners in the following particulars, to-wit:

1. It was error in the Court to find or rule that any appropriation made by either of the respondents of the waters of a stream in the State of Wyoming gave to them, or either of them, any priority over any right acquired by these petitioners or any of the defendants, under or by virtue of the laws of the State of Montana, or to the waters of any stream within the State of Montana.

2. It was error in the Court to find or rule that any appropriation made by either of the respondents of any water within the State of Wyoming, or made under the laws of Wyoming, or any right to the use of the water of any stream in the said State of Wyoming, or acquired under its laws, furnished any basis before any court sitting in the State of Montana for an injunction against these petitioners, having appropriated and acquired the

right to the use of the waters being used by them within the State of Montana, under and by virtue of the laws of the State of Montana.

3. It was error in the Court to find or rule that the Court had any jurisdiction to enforce, as against citizens of the State of Montana using waters within the State of Montana, of streams within the State of Montana, appropriated under its laws, rights claimed to have been acquired by the respondents to the use in the State of Wyoming of the waters of a stream within the State of Wyoming, acquired under and by virtue of the laws of the State of Wyoming.

4. It was error in the Court not to dismiss the petition of the respondent Howell, and it was error to grant him any relief, for that it appears that the Court has no jurisdiction of the subject matter of his petition or to grant him any relief, because he has not shown that he is or was at any time a citizen of any state other than the State of Montana, of which the defendants against whom he seeks and was granted relief are citizens.

5. It was error in the Court to grant any relief to the respondent Morris, for that the respondent Morris consenting to the respondent Howell's joining with him in the prosecution of this suit against the defendants, the respondent Howell appearing to be a citizen of the same state with defendants, the court lost jurisdiction and had no power to enter any decree except one of dismissal.

6. It was error in the Court to find or rule that any acts of the respondents in the State of Wyoming, while the

lands now owned by these petitioners were a part of the Crow Indian reservation, gave to the said respondents any priority of right to the waters of Sage Creek as against the rights of the Indians to the waters of the streams within the said reservation, or as against any person acquiring any of said lands through which any streams of said reservation might flow, and particularly as against these petitioners acquiring lands within what was the said Crow Indian Reservation, at the time of the alleged appropriations of the said respondents, on the opening of said reservation, through which flowed the streams, from making use of the waters of which the decree entered herein enjoins these petitioners.

7. It was error in the Court to hold that any acts of the respondents, towards the appropriations of the waters of any stream in the State of Wyoming gave to them any rights as against occupants of lands within what was formerly the Crow Indian Reservation, as to streams flowing through the same, antedating the time when such lands ceased to be a part of said Crow Indian Reservation.

8. It was error in the Court to find that the cause of action of neither of the respondents is barred by the Statute of Limitations.

9. It was error in the Court to find that neither of the respondents is guilty of such laches as to defeat his right to maintain this action.

10. It was error in the Court to find that neither of the respondents is estopped from maintaining this action.

11. It was error in the Court to find that neither

of the respondents has abandoned any right he ever acquired as against these petitioners to the waters of Sage Creek.

12. It was error in the Court to find or rule that the waters of said Creek, during the irrigating season do not sink in the channel thereof, above the land of either of the respondents, or that a useful quantity of the same would reach the lands of the respondents during the irrigating season, but for the diversion of the same and its tributaries by the defendants, and to fail to find or rule that the waters of said Creek, during the irrigating season, sink in its bed or channel, so that, though the defendants diverted none of the same or the waters of the tributaries of the said Sage Creek, a useful quantity thereof would not reach the lands of either of the respondents.

13. It was error in the Court to find that the respondent Morris is entitled to, or to adjudge to him, more than twenty-five inches, miner's measurement, of water, or to find that the respondent Howell is entitled to, or to adjudge to him more than forty inches, miner's measurement, of water.

14. It was error in the Court to award to either of the respondents any number of inches, "miner's measurement," for that in his bill of complaint the respondent Morris alleges an appropriation of two hundred and fifty inches "statutory measurement," and the respondent Howell six and one-fourth cubic feet per second, neither alleging an appropriation of any number of inches "miner's measurement."

15. It was error in the Court to award to either of the respondents any quantity of water measured by miner's inches, for that the standard for the measurement of water in the State of Wyoming is one cubic foot of water per second, and because a miner's inch is an uncertain and indeterminate quantity.

16. It was error in the Court to hold that the respondent Morris acquired a water right, notwithstanding he failed to comply with the laws of Wyoming in reference to the filing of a statement of his appropriation, as required by the laws of that state.

17. It was error in the Court to hold that the respondent Howell acquired a water right, notwithstanding he failed to comply with the laws of Wyoming by filing an application and obtaining a permit, as required by Section 34 of the Act of the Legislative Assembly of the State of Wyoming approved December 22, 1890.

18. It was error in the Court to hold it unnecessary for either of the respondents to make proof that their appropriations respectively were made either on the public domain or on private lands, with the consent of the owner of such lands.

19. It was error in the Court to hold that the amount in controversy exceeded $2,000.00.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals, for the Ninth Circuit, commanding said court to certify and send to this court,

on a day certain therein to be designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals therein, to the end that the said cause may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the court of the United States, and for other purposes," approved March 3, 1891, and that your petitioners may have such other or further relief or remedy in the premises as to this court may seem proper and in conformity with said act, and that the judgment and decree of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this honorable court. And your petitioners will ever pray.

J. N. BEAN,
W. R. BAINBRIDGE,
S. W. BENT,
WALLACE BENT and
CORBETT BENNETT,
Petitioners.

By Thomas J. Walsh
Attorney and Counselor for the Petitioners.

THOMAS J. WALSH,
CORNELIUS B. NOLAN,
GEORGE W. PIERSON,
Of Counsel for Petitioners.

122.

No. [redacted]

FILED.

DEC 28 1908

JAMES H. McKENNEY,

CLERK

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vs.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

WALSH & NOLAN, and
GEORGE W. PIERSON,
Solicitors for Petitioners.

THOMAS J. WALSH,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The petitioners ask a review of the decree of the Circuit Court of Appeals in this case because of the great public importance of at least four of the legal questions involved, specified in the petition herein, with regard to three of which the opinion filed by that learned court is entirely silent.

For the detailed discussion of the propositions which it is respectfully submitted are of such grave moment as to invite consideration by this court, it is respectfully referred to the brief in the Circuit Court of Appeals and presented with this brief. Scarcely anything more is here attempted than a statement of the grounds upon which the petitioners base their claim that the learned court

hearing the matter on appeal erred in its affirmance of the decree.

1. *The Source of the Right of Appropriation.*—

The question of the right to maintain the suit at all goes to the very foundation of the right of appropriation of the waters of the streams in the west for the purposes of irrigation.

Two conflicting theories are advanced concerning the origin of the right. One is, that it is national in its origin; the other, that it comes from the state. The first theory holds that the national government, by reason of its ownership of the public lands, owns all the waters of the innavigable streams that flow through those lands, and that it grants to appropriators of water the right to the use of the same by virtue of the act of July 26, 1866, and subsequent acts of Congress. If that theory is correct, it is manifest that state lines may be neglected, as county lines within a state would be, in controversies over water rights, except as the state laws might prescribe the particular steps to be taken to secure the right of appropriation. The other theory holds to the view that the *state* and not the *national* government owns the waters of such streams within its borders, and that it disposes of those waters by virtue of its own laws, either by giving rights in them to appropriators or to riprarian proprietors, according to such policy as it may see fit to pursue.

If that view be accepted, it follows that the respondents in this case got whatever rights they have from the State of Wyoming in the disposition of property owned by

it, and that the petitioners got such rights as they have from the State of Montana in the disposition of property owned by it; that the State of Wyoming had no power or authority to dispose of rights to the waters of streams in Montana and did not undertake to do so, and that when the State of Montana granted certain rights to the petitioners in the waters of streams within its borders, those rights were taken by them without prejudice on account of any earlier grants by the State of Wyoming to its citizens of the waters of the same stream within that state.

The conflicting views are made clear by the following extracts from opinions of the federal and the state courts, respectively, by which the subject has been considered.

First, expressions from the federal courts.

> "The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part therof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem proper."

U. S. District Judge Knowles in

Howell vs. Johnson, 89 Fed. 556.

> "It is urged that in some way the state of Montana has some right in these waters in Sage Creek or some control over the same. It never purchased them. It never owned them. * * * In that case (St. Anthony Falls Water Power Co. v. Board of Water Com'rs of St. Paul, 18 Sup. Ct. 157) it was not held, nor was it held in any of the cases cited in the decision therein, that the rights of the owner of the

land through which any navigable stream flowed, within the boundaries of the state, depended upon the laws of such state, or that the said owners' right to such waters depended upon such laws, as against one who claimed a right to the same under the laws of congress. To so hold would uphold the view that a state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The state of Montana cannot step in, and say, 'The right to the water of Sage Creek, which the plaintiff acquired under the laws of congress, you cannot exercise in this state.'"

Id.

Now from the Supreme Court of Wyoming, whose constitution provides that "The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state."

Touching this provison it is said in

Farm Investment Co. vs. Carpenter, 9 Wy. 110, 61 Pac. 258;

"At the outset, however, it is strenously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice. * * * Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters

are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were publici juris, and, according to Bracton, that was the rule anciently in England. Kin. Irr. Sec. 53; Gould, Waters, Sec. 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. Irrigation Dist. v. Bradley, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however, this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies

of water to be the property of the public or of the state."

The court invites attention to a similar legislative declaration in Arizona and Nevada and to the fact that the people of Colorado made a simlar assertion through their constitution in reference to which the Supreme Court of that state said, in

> Wheeler vs. Irrigation Co., 10 Col. 582, 17 Pac. 487;
>
> "Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership there of being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator."

And in

> Ft. Morgan L. & Co. Co. vs. South Platte Co., 18 Col. 1, 30 Pac. 1032;
>
> "Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired."

A similar declaration as to the state's ownership of the waters within it is made in the constitution of North Dakota.

> North Dakota Const., Art. 17, Sec. 210.

A most instructive consideration of this subject and

the conflicting opinions of courts touching it will be found in

1 Farnham on Waters, 135 to 136a,

and in

2 Farnham on Waters, 649 to 652.

Neither the constitution nor the statutes of Montana contain any express declaration on the subject, but the Supreme Court of that state said in

Smith vs. Denniff, 24 Mont. 20,

> that "the state of Montana has by necessary implication assumed to itself the ownership, *sub modo*, of the rivers and streams of this state, and, by section 1880 et seq. of the Civil Code, has expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this state as owner of the water."

With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say and does say whether those waters shall be enjoyed by the riprarian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them. They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights.

Forbes vs. Gracey, 94 U. S. 762;
Jennison vs. Kirk, 98 U. S. 453;
Broder vs. Water Co., 101 U. S. 274.

If it be true that the rights existed before there was any legislation whatever on the subject by Congress, in what did they orignate? Clearly in the local law. But neither a state nor any subdivision of the state has any power to dispose of the public lands. That power is vested, by the express provisions of the constitution, in Congress. The deduction is inevitable that if these rights were in existence prior to the time that Congress acted at all, they must have been derived from some authority other than Congress.

The act of 1866 was simply a formal renunciation on the part of the United States of any claim it or its grantees might have to the continued flow in the stream of water that had been appropriated, assuming that it or they had any such. It was, as disclosed by its very terms, a statute of repose, not of grant. Nor can we imagine, as seems to be intimated in Howell vs. Johnson, that by this statute power was delegated to the local legislatures to enact laws looking to the disposition of the waters of the streams on the public domain. If such waters are indeed incidents of the lands or the right to use such waters incident to the lands over which they flow, such a delegation of power to legislate on a subject confided by the constitution exclusively to Congress would be void.

That the state owns the navigable waters within its borders and the soil under them is not open to question.

Shively vs. Bowlby, 152 U. S. 1.

On acquiring new territory, the general government becomes invested with the title to such waters and lands, but holds them, not as it holds the general body of the public domain, subject to disposition for the benefit of the general treasury, but in trust for the people of the state or states, which may ultimately be formed out of the new territory, which state or states, on being admitted, have the absolute right of disposition of such lands and waters,

Id. pages 48 and 49,

without any permission from Congress.

And why has the state the title to navigable waters and the soil under them? Plainly because such waters are devoted to a public use as public highways. It is not necessary to go beyond Shively vs. Bowlby, to find an answer to this question.

Now, in the arid regions, irrigation is a public use of importance no less than is navigation in the more humid sections. The great empires now arising in majesty out of the heart of the American Desert, could never have been heard of, as their courts have declared, were it not that their waters have been held devoted to this great public use. The Supreme Court of the United States did not hesitate to say in

Fallbrooke Irrig. Dist. vs. Bradley, 164 U. S. 112-164,

"We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." It is declared to be such by the constitution and statutes of nearly every western state.

Now if the state owns the navigable waters within its borders, because they are devoted to a public use, why does it not equally own the non-navigable waters in those states where they are, and, since civilization had its feeble beginnings within their territory, have been devoted to a public use?

It is alone upon this theory that the legislation of the western states, prescribing the manner and conditions of the acquisition of a water right can be justified. If the general government owns the waters of the streams flowing through the public domain, what right has a state to pass laws looking to their disposition? Why must one adhere to the laws of Montana or of Wyoming in the acquisition of a water right in those states, respectively, if the property right to be acquired belongs neither to the one nor to the other, but to the United States? Are all these laws, truly enacted with reference to a subject matter of which the states have no jurisdiction whatever? Not at all. They are legislating with reference to the disposition of their own property and their own rights, and Congress recognized this in the Act of 1866. The validity of legislation of this character was upheld in

> Gutierres vs. Albuquerque Land & Irrig. Co., 188 U. S. 545.

Now if the respondents must look to the State of Wyoming for whatever rights they have to the waters of Sage Creek, it follows logically that they have no water right which they can assert against these petitioners. If the State of Wyoming owns all the waters in that state, it

follows, "as the night the day," that the State of Montana owns all the waters in that state; that neither the one nor the other enjoys any priority, and that neither can grant any priority as against the other, nor any of its grantees. This theory of the ownership of water rights contemplates that from the beginning the waters were held in trust for the people of the state that was to be, and which eventually became the owner when it came into existence. Montana owns all the waters within its borders, and Wyoming owns all the waters within its borders, each being entitled to dispose of them as it sees fit.

A recent decision by the Court of Errors and Appeals of the State of New Jersey asserts the ownership by the state of the waters of running streams within it, subject to the limited right of riparian proprietors, as is seen by the following language from the opinion.

> "Since the exercise of all rights of private ownership, by all riparian owners, still leaves the stream to remain as a running stream, there remains a residuum of comon or public ownership that, under our system, rests in the state as a trustee for all the people."
>
> McCarter vs. Hudson County Water Co., 65 At. 489-496.

In that case an act forbidding the diversion of the waters of the streams of New Jersey to supply cities of adjacent states was sustained. On writ of error to this court the validity of the act was upheld.

> Hudson County Water Co. vs. McCarter, 209 U. S. 349.

The view of the ownership by the state of the waters

of the streams within its territory, subject, of course, to the control by the national government of navigable streams, under the power to regulate commerce, as distinguished from the view that the waters of all the streams in the public land states belong to the nation as an incident of its ownership of the public lands, has never received the consideration in connection with cases like the one which this court is asked to review that its importance demands.

It will be conceded that the federal government, as an owner of land, has no greater rights than any other owner of land. If the private riparian owners in the State of New Jersey have no such absolute right in and to the waters of the streams of that state, as will enable them to confer upon their grantee the right to take those waters out of the state—that is, the right of absolute disposition—neither have the United States any such right of absolute disposition as to the waters of streams towards which they sustain the relation of riprarian proprietors.

The question which it is hoped may be presented for consideration by this court has an importance far beyond even the immediate controversy in which it arises.

The administrative officers of the national government charged with duties in connection with the public lands are proceeding upon the assumption of absolute ownership by it of all the waters of the streams flowing over or through such lands.

The Forestry Bureau disposes of the right to the use of the water of streams within forest reserves for irriga-

tion and power purposes, considering it a "resource" of the national government. It grants "permits" (for a consideration, in the case of plants for the development of power) for the use of such waters.

"THE USE BOOK",

a publication issued by the Forest Service, says, in its introduction, "The timber, *water*, pasture, minerals, and other *resources* of the National Forests are for the use of the people. They may be obtained under reasonable conditions without delay."

The same book says—page 36—"The Secretary of Agriculture has entire jurisdiction over the National Forests, except in matters of surveying and title. He can not convey any kind or degree of title to the land itself. He has authority to grant permits for the occupancy of lands and the use of *resources* of National Forests."

Accordingly, Regulation 6 provides: "Permits are necessary for all occupancy, *uses*, operations or enterprises of any kind within National Forests;" and

Reg. 7. * * * "The Forester may also make a reasonable charge for any permit, right, or use."

Though one should acquire the right of occupancy within a forest reserve, he could not make *use* of a *resource*, the water flowing in streams within it, without obtaining a permit. He could not divert the water of a stream by means of a ditch, carrying it to a power plant or to a farm beyond, without a permit, and the payment of such "reasonable charge" as might be exacted. The right of abso-

lute ownership is asserted. If such right can be maintained one securing a "permit" from the Forestry Bureau to do so, could, notwithstanding any state statute forbidding it, divert water from a stream within a forest reserve in one state into another state for municipal purposes or for irrigation or the development of power there. Many forest reserves embrace portions of adjacent states.

The right of the state in the waters of streams within its borders, as asserted in the McCarter case, has never had a hearing or, at least, apparently, serious consideration from the courts that have considered the right of a citizen of one state to come within another to enjoin a citizen of the latter from making use of the water of a stream, by authority of the laws of his own state, on the claim of the complainant that he has an earlier appropriation made in the state of his residence.

It was presented to Judge Knowles in Howell vs. Johnson, 89 Fed. 556, (which, by the way, was the same controversy as is here involved, practically between the same parties,) but he assumed as an indisputable proposition that "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell, or grant the same, or the use thereof, separate from the rest of the state under such conditions as may seem to it proper."

Under that view of the law, the federal government could sell the water of a stream flowing through a forest reserve in the State of Idaho to the City of Salt Lake, or to a corporation supplying it or its people with water, and

the diversion could be accomplished in defiance of any law the people of Idaho might pass.

Holding to that view of the absolute and unlimited right in the federal government to make disposition of the waters of streams in the public land states, he easily held that state lines were to be disregarded in the consideration of conflicting rights. He adhered to this view when the contentions of the parties were renewed in this case.

Morris vs. Bean, 123 Fed. 618.

His ruling was adopted by Judge Morrow, without any expressed comparison of the opposing theory, in

Anderson vs. Bassman, 140 Fed. 14.

Whether it was even presented to the court does not appear from the opinion, and if it was urged before the Circuit Court of Appeals for the Ninth Circuit, in

Rickey L. & Co. Co. vs. Miller, 152 Fed. 11,

no intimation is given that it had the attention of the court. Though that learned court was earnestly appealed to, in the cause now sought to be reviewed, to enter upon a consideration of the foundation of the right of appropriation, it contented itself with simply referring to its ruling in Rickey L. & Co. Co. vs. Miller. Judge Hallett held in

Hoge vs. Eaton, 135 Fed. 411,

that state lines are immaterial in these controversies, referring simply to the conclusion of Judge Knowles in Howell vs. Johnson.

The Supreme Court of Wyoming having repudiated his idea of federal ownership of the waters of the streams of the public land states, in Farm Inv. Co. vs. Carpenter,

61 Pac. 288, with strange inconsistency, makes his decision in Howell vs. Johnson the basis of the conclusion it reaches on a question related to the one presented by this record in Willey vs. Decker, 73 Pac. 210.

Considerations innumerable invite a speedy determination by this court of the basic principles involved in the conflicting contentions of the parties to this litigation. Problems depending for their proper solution upon the correct apprehension of them are continually arising in connection with congressional action of importance to all sections of the country, but particularly to the rapidly developing west.

The two theories of the ownership of the waters of the streams flowing over or through the public lands have been the subject of earnest discussion in Congress. See "Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 15,444, extending the Time for Constructing a Dam across Rainy River," particularly the speech of Hon. Henry M. Teller in the United States Senate, found at page 35, and the Statement of Hon. James R. Garfield, Secretary of the Interior, at page 87.

The petitioners respectfully ask an opportunity to present to this court that the states respectively and not the national government own the waters of the streams within their borders, and that the right to the use of the water from such streams, though they flow over or through public lands, comes from the state and not from the nation.

2. *The Wyoming Appropriators should have no Pri-*

ority because Montana's citizens were denied an Opportunity to Appropriate in their State because of the existence of the Crow Indian Reservation.

In the course of the congressional debates above referred to it was contended that the court had decided in Kansas vs. Colorado, 206 U. S. 46, that the state owned the waters of streams within it. Counsel for the petitioners do not feel able to assert that it was so decided. But the court did determine that, at least when appealed to for the writ of injunction, it would consider the general equities of the case, and that neither party could demand that it be decreed to have all the water of the stream regardless of the needs of the other.

The additional equity in favor of the Montana appropriators arises out of the fact that the stream in question drains a region which, until immediately before the petitioners made their appropriations, was a part of the Crow Indian Reservation.

By the treaty of 1890 the lands occupied and owned by the petitioners and watered by them from Sage Creek, as well as the head waters of that stream, were thrown open to settlement. Theretofore, no one was permitted to go within that region to acquire either lands or water. The citizens and settlers of Wyoming might occupy the territory right up to the Montana line for a stretch from the 107th Meridian West, to where the Yellowstone River crosses it, a distance of 150 miles, and might, if the contention of the appellant is correct, appropriate every drop of water collected in that vast and now marvelously pro-

ductive and wealthy region, which should flow southward, leaving it, when it should eventually be open to settlement, a parched and hopeless desert. By what right may the citizens of Wyoming thus claim a priority in these waters over those of Montana? If they may, our state is most grievously burdened by its even now vast Indian Reservations. When they are eventually opened, as they are now fast being, we may find that citizens of other states have, by virtue of acts done therein, acquired the right to come within our state and appeal to the courts to divest the settlers on them, of the waters taken from the streams that flow through their lands, and have their sources within the newly opened territory.

Is it possible that citizens of Wyoming, under the sanction of either state of federal legislation, had the right to appropriate to themselves all the waters of the reservation by diversions made in Wyoming so that when they should eventually be thrown open to settlement, the Indians could realize nothing for their lands over and above the trifle at which they would sell for purely grazing purposes?

The suggestion made by the learned district judge of the United States Circuit Court for the District of Montana, that, assuming that the waters were not subject to appropriation prior to the opening of the reservation, the appropriations became effective *co instanti* upon the accomplishment of that fact, does not meet the case, and nothing in the decisions cited in support of this view seems to sustain it. The waters for all practical purposes are

subject to appropriation, if, immediately upon the reservation's being opened, prior appropriations take life as against those made on the land subject to entry. However diligent settlers on the newly opened land might be, they could by no possibility secure a priority.

It would appear that the Circuit Court of Appeals overlooked this feature of the case as the opinion makes no mention of it, though purporting to enumerate the various questions presented by the appellants.

3. The Citizenship of Intervenor.

Another most important question, likewise apparently inadvertently neglected, is the want of diversity of citizenship between the intervenor and the defendants.

It is conceded that the intervenor Howell is a citizen of Montana. He resides at Billings, in that state. No attempt was made to show that at the time of filing his petition, or at any time since, he resided in Wyoming.

The decree of the Circuit Court, so far as it awards him any rights, can not stand. It is sought to justify it on the ground that the jurisdiction of the court being invoked by the respondent Morris, Howell had a right to intervene, and have his rights adjudicated, even though he should be a citizen of Montana. To this proposition we most respectfully dissent. It is conceded that when, by virtue of any action, property is brought before the Federal Court of Chancery, which is to be disposed of in the action, any person claiming an interest in the property may be made a party without regard to citizenship. Thus, in an action to foreclose a mortgage, judgment creditors or

holders of mechanics' liens may be admitted as parties, for the purpose of establishing their rights, without reference to their citizenship.

Lilienthal vs. McCormick, 117 Fed. 89.

So, in admiralty, which usually proceeds *in rem*, any one claiming a lien upon, or interest in the property in litigation may come in. It is plain from

Rouse vs. Lechter, 156 U. S. 47,

that to warrant an intervention without respect to the citizenship of the intervenor, the property that is the subject of the action must be *in custodia legis*. But there is no property before the court in this case. There can be none. The property which was made the subject of the bill of complaint—complainant Morris' water right—is not in Montana, but in Wyoming, beyond the jurisdiction of the court. The jurisdiction to proceed at all in this case can be maintained only on the theory that it is a purely personal action.

The Circuit Court for the District of Montana cannot adjudicate on water rights in the State of Wyoming.

Conant vs. Deep Creek Co., 66 Pac. 188.

But, finding within its jurisdiction one who threatens to do the complainant a wrong with reference to property beyond its jurisdiction, a court of equity will bring his person before it, and restrain him from doing that wrong. This case proceeds upon the theory of

Penn vs. Lord Baltimore, 1 Ves. 444, and
Massey vs. Watts, 6 Cranch. 148,

(see Notes to Penn vs. Lord Baltimore in II Lead. Cas. in Equity, 1817,)

namely, that it is a personal action.

His appearance here can confer no jurisdiction on the court over any controversy between him and these petitioners.

> "The Circuit Court cannot take jurisdiction of an intervention in a merely personal action in which no fund has come into the possession of the Court by one who is a citizen of the same state as the party against whom his complaint is directed."
>
> Seligman vs. City of Santa Rosa, 81 Fed. 574.

In that case Judge Morrow referred to the case of

> United Electric Co. vs. La. Electric Co., 68 Fed. 673,

in which one of the propositions determined is thus expressed in the syllabus:

> "Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and during the proceedings, a third party, who is a citizen of the state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant's property, in which the intervenor claims some interest."

Howell had no right to intervene in this action, and the order permitting him to do so was erroneous. And, the complainant having voluntarily assented to his intervening, the jurisdiction of the court was destroyed.

> Forest Oil Co. vs. Crawford, 101 Fed. 849.

In that case, the plaintiff, claiming an undivided interest in certain lands, brought his action to quiet his title, alleg-

ing diverse citizenship. Afterwards other citizens of the same state with the defndant were permitted to intervene, and establish with plaintiff their joint claim against the defendant. The Circuit Court of Appeals for the Third Circuit held the jurisdiction failed, saying:

> "We cannot shut our eyes to the quite apparent fact that he voluntarily assented to the irregular proceedings by which his bill, even if otherwise maintainable, was made fatally defective by the misjoinder therein of others as his co-plaintiffs. He seems to have been entirely satisfied to have the interposing parties united with himself, to assert with them a joint claim, and to recover with them a joint judgment; and he should not, we think, be now relieved from the consequences of his association."

Forest Oil Co. vs. Crawford, 101 Fed. 852.

Although this is not a joint judgment, nor do the respondents prosecute a joint claim, still had they united in the first instance, as they might very properly have done, to assert jointly their several claims and to obtain a judgment requiring the petitioners to allow to flow down the stream the sum of 110 inches and 100 inches of water, there could be no doubt that the court would be powerless to proceed for want of jurisdiction, if that jurisdiction rests upon diversity of citizenship.

4. The Amount in Controversy.

The subject of the controversy, as was justly said by the learned judge before whom the suit was tried, is the complainant's water right. On the value of that right depends the jurisdiction of the United States Circuit Court. The bill avers it to be $2,000, no more. It is, indeed, averred that the amount in controversy exceeds

$2,000 exclusive of interest and costs, but in view of the direct averment that the complainant's water right is of the value of $2,000, the general averment that the amount in controversy is greater than that sum must be deemed to be in the nature of a statement of a conclusion of law and valueless, or else as controlled by the later specific averments as to the value of the property involved.

It is true the bill avers that the complainant has been damaged in the sum of $2500 by defendants' interferences with his water right, but damages in equity can be awarded only as incidental to the main relief. The jurisdiction to award damages is a *dependent* jurisdiction. If the court of equity has no jurisdiction over that feature of the controversy, by reason of which alone it is entitled to hear the cause, because the value of the litigated right is not sufficiently large, its jurisdiction cannot be helped out by the amount of damages claimed in consequence of an invasion of that right.

But more. The damages that might be awarded could not by any possibility exceed the value of the property right injured. One cannot recover damages for injury to property in excess of its value.

Lentz vs. Carnegie, 27 Am. St. Rep. 717.

If the complainant were, by proceedings in eminent domain, deprived for all time of his water right, his damages, conceding its value as averred in his bill, would be just $2,000. It is apparent, then, that that is the amount in controversy. Accordingly, we insist that the bill shows on its face that the court has no jurisdiction and we sub-

mit that the evidence confirms the want of jurisdiction disclosed by the bill.

Undoubtedly in actions "sounding in damages" the amount claimed as damages controls. But this is not an action sounding in damages. It is an action in equity for an injunction, damages being asked as merely incidental relief. It is more nearly like an action to quiet title in which the value of the property is the test.

> Simon vs. House, 46 Fed. 317;
> Smith vs. Adams, 130 U. S. 167.

> "In determining from the fact of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. Barray v. Edmunds, 116 U. S. 550, 560; Wilson v. Danier, 3 U. S. 3 Dall. 401, 407."

> Vance vs. Vandercook, 170 U. S. 468-472.

> "Value Distinguished from Amount—Property Rights Involved.—Where property itself or its title is in litigation, or some question *per se* affecting its enjoyment and possession, its value is the real matter in controversy, as distinguished from the claims of the contending parties."

> 1 Ency Pl. & Pr. 726.

For want of showing by the bill of a dispute in which the amount exceeds $2,000, the court never acquired jurisdiction.

The learned district judge in directing the decree to be entered, recognized that the averments of the bill would not support the jurisdiction of the court and ordered that

the complainant have leave to amend his bill to conform to the proof,

Transcript, page 640,

it being found that the complainant's water right is of the value of $3,200.

Transcript, pages 168-175.

No application was ever made to amend nor was any order amending the bill or permitting it to be amended entered, nor was any amendment of the bill ever made. The decree in this case is affirmed, though it was entered upon a bill which the trial court recognized to be fatally defective for want of the esential jurisdictional averments.

The finding that the complainant's water right is of the value of $3,200.00 was recognized by the trial judge to be valueless in the absence of averments in the bill upon which such a finding could be sustained. "The court can no more consider what is proved, but not alleged, than what is alleged but not proved."

The defect is all the more important as it is submitted that upon any fair consideration of the evidence adduced the complainant's right, whatever it may be, is but a small part of the amount awarded him, 100 inches, and upon the most liberal estimate of its value can not reach $2,000. This ground of objection to the decree likewise received no mention in the opinion of the Circuit Court of Appeals.

Indeed, both jurisdictional objections—the want of diversity of citizenship between the intervenor, and the defendants, and the positive averment that the complainant's water right is of the value of but $2,000, as well as

the point that the decree is inequitable as to Montana citizens because they were denied an opportunity to appropriate until they did so, by reason of the existence of the Crow Indian Reservation, were wholly ignored by the Circuit Court of Appeals, while a fourth question of great public moment was disposed of without any discussion whatever of the consideration upon which the petitioners founded the claim made by them.

The court even enumerates other questions discussed by counsel before it, but in no manner even adverts to the three important questions which this court is by this petition asked to consider. As to the fourth, no intimation is given even as to the grounds upon which the petitioners found their contention that the waters of the streams of Montana belong to its citizens and are subject to disposition only by its laws. The opinion simply declares that "the mere fact that the stream has its source in one state does not authorize a diversion of all the waters thereof, as against an earlier and prior appropriator across the line in another state." That is the proposition to be demonstrated. But there is no demonstration. The rule is declared, but no reasons whatever are advanced to sustain it. In its opinion the court says:

> "4. Other questions argued by appellants, such as the alleged laches of the complainant, abandonment, adverse user by defendants, and insufficiency of the evidence to justify the decree as to the number of inches of water actually appropriated by the complainant and intervenor, do not require discussion."

It is most respectfully insisted that upon a careful consideration of the evidence, the contention of the appel-

lants in the Circuit Court of Appeals, the petitioners here, that the evidence would not justify the conclusion that the complainant ever appropriated more than 20 inches of the waters of Sage Creek, and that he lost that even by abandonment and adverse user by the petitioners, ought to be upheld. But as the learned judges of that court evidently had those contentions in mind in the framing of the opinion which they rendered, no appeal is made to this court for a review of the case because of error of the court in respect to those grounds. Upon the very important questions, however, herein specified and which were presented in the brief before that court and in the argument, and which were so feebly in the minds of the learned judges as not even to have received mention in a catalogue of the points urged, it is most respectfully insisted that a hearing in this court should be granted.

Respectfully submitted,

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GEORGE W. PIERSON,

Solicitors for Petitioners.

THOMAS J. WALSH,

Counsel for Petitioners.

122.

No. [redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

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Petitioners,

vs.

W. A. MORRIS and T. N. Howell,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

N. W. McCONNELL and
O. W. McCONNELL,
Solicitors for Respondents.

N. W. McCONNELL,
Of Counsel for Respondents.

State Publishing Co., Stationers, Printers and Binders, Helena, Mont.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The facts of this case are substantially as stated in the petition for the writ of certiorari, with the exception of the statement contained in page 5 of the petition, that T. N. Howell was allowed to intervene over the objection of the petitioners. This is not correct, for consent was expressly given for the said T. N. Howell to intervene in this case by each and all of the petitioners as well as the other parties to the suit, as appears from pages 68 and 69 of the Transcript in this case. It is also not one of the findings of the court, as stated on page 6 of the petition, "that the appropriations of the intervenor and that of the complainant were made at a time when all of the

territory drained by Sage Creek and its tributaries was a part of the Crow Indian Reservation, the south line of which conformed to the south line of the State of Montana." The court made no such finding as this. The facts of the case are briefly summarized in the ~~brief~~ decision of the Judge who delivered the opinion of the Circuit Court for the District of Monana, and is found in the case of Morris vs. Bean, 146 Fed., page 425, and also in the decision of the Circuit Court of Appeals in the case of Bean vs. Morris, 159 Fed., page 652.

We do not agree with counsel that the matters involved in this action are of such paramount importance as to invoke the extraordinary writ of certiorari in this court to the Circuit Court of Appeals of the Ninth Circuit. From the statement of facts this court will observe that this is an action to enjoin certain parties from interfering with the prior rights of the complainant to a small stream flowing from the State of Montana into the State of Wyoming. The issues in this case were so fully gone into in the decision of the Judge of the Circuit Court for the District of Montana, and again by the Circuit Court of Appeals for the Ninth Circuit, thoroughly and fully adjudicating all of the rights between the parties, and in keeping and consonant with the decisions, both Federal and State, that this case does not merit a review by this court.

Taking up the propositions which petitioners seek to have this court review in the order in which they are discussed by counsel for petitioners, we have

I.

THE RIGHT OF PRIOR WYOMING APPROPRIATORS AS AGAINST JUNIOR MONTANA APPROPRIATORS IN THE WATERS OF AN INTERSTATE STREAM.

The contention of petitioners is that the waters of Sage Creek, situated in Montana, under the constitution and the laws of Montana, belong to the people of the State, in their collective capacity, subject to be used by individual citizens of the State when appropriated under the laws of the State, and that a citizen of Wyoming cannot appropriate and acquire a right to the use of waters in such creek as against the citizens of the State of Montana, although this same stream flows from the State of Montana across the State line into the State of Wyoming.

Water, while regarded as real estate so long as it flows in its natural channel, is not like real estate in that it is fixed to one locality. It flows continuously, and in doing so, disregards state lines, and passes from one state into another. The right to the use of water is property. There is no distinct and separate ownership of corpus in the water itself, but the right to the use of it acquired by priority of appropriation is property, and is subject to the usual incidents of property, and will be protected as such. A water right is property within the constitutional provision that private property shall not be taken or damaged for a public or private use without just compensation. A person who has acquired a right to the use of water for

irrigation by appropriation can be deprived thereof only by his voluntary act, by forfeiture or by process of law.

While the legislature of a state has the right to regulate the use of water among the various appropriators from a common stream, it has no power to deprive an appropriator of his right, or any material part thereof under the guise of regulating the use of water. The Legislature of a State has not the arbitrary power by its mere fiat of changing the ownership of property. It can no more accomplish such a result than it could by legislative declaration change the laws of nature and prevent an interstate stream from flowing down hill. The broad principle which underlies the relative rights of appropriation fro mthe same stream is that whoever is first in time is first in right, and this is so, regardless of the fact that a portion of the appropriators of said stream are citizens of one state and other appropriators are citizens of another state. This was the custom established in the early communities in the arid regions of the West, before there was ever any legislation upon the subject, either state or national. It is the principle of common sense; it is the principle of justice and equity. Montana recognizes the right to water by appropriation, and its statutes provide that he who is first in time is first in right. Every inch of all the waters in all the streams in the State of Montana are subject to this acknowledged doctrine of appropriation. Under the laws of the State of Wyoming the respondents had the right to and did make an appropriation of the waters of Sage Creek in the State of Wyoming. When they made their

appropriations out of Sage Creek there was not a single appropriator who took water out of the creek in the State of Montana. The right to the use of water flowing in Sage Creek was acquired by the respondents absolutely. This right was property, guaranteed, not only by the laws of Wyoming, but by the constitution and the laws of the United States. Consequently the petitioners, confronted with the fact that the waters of Sage Creek had already been appropriated by the respondents, made their appropriation from identically the same stream. Must it be that the property rights acquired in this water under the law by the respondents, shall be destroyed in order that the petitioners might acquire a property right in the same waters? Must it be that the universal rule governing the law of appropriation of water from a running stream that the first in time is first in right shall be set aside and destroyed? We insist that when the State, and through it the people of the State, acquire the right to a portion of an interstate stream, they take that right subject to the existing rights of appropriators in the adjoining State, acquired under the laws of said State to the waters of such interstate stream. It cannot be said that they have the unquestioned title to the whole of this water. So far as the decrees of courts have been granted affecting the rights of appropriators in interstate streams, they have wholly disregarded state lines and have recognized the right of appropriators of waters in interstate streams in the order of their priority of appropriation.

Four times has this matter been passed on involving the

waters of this same stream and between the same parties: First in the case of

Howell vs. Johnson, 89 Fed. 556.

In this case it was held that,

> "One who has acquired a right to the use of a stream flowing through the public lands by prior appropriation in accordance with the laws of the State is protected in such right by the Revised Statutes, Sections 2339-2340, as against subsequent appropriators, though the latter withdraw the water within the limits of a different State."

The case at bar was before the court again and reported in

Morris vs. Bean, 123 Fed. 618.

in which the same doctrine is reiterated.

We call the court's particular attention to the able, learned and lucid opinion of Judge Edward Whitson, who decided this case in the Circuit Court for the District of Montana. His opinion is to be found in the case of

Morris vs. Bean, 146 Fed. 423.

In this opinion the court takes up and discusses and decides adversely to the petitioners all of the propositions now sought to be raised by the writ of certiorari, citing ample and abundant authorities in support of his contention.

We also refer to the case of

Bean vs. Morris, 159 Fed. 651,

which contains the opinion of the Circuit Court of Appeals, Ninth Circuit, in which it is seen that the court decides

the question of interstate streams and the question of Indian lands, two of the propositions urged by counsel for petitioners, adversely to the petitioners, giving authority and reason therefor. And as to the other two propositions raised by counsel for petitioners, namely, the citizenship of the intervener and the amount in dispute, the court states that they find no error in the record, and from the subsequent discussion of these propositions in this brief it will be seen that it was not incumbent upon the court to notice them.

We call the court's attention to the following decisions bearing directly upon the right of a citizen of one state to appropriate and take the water of an interstate stream, regardless of the appropriation of a citizen of an adjoining State:

Rickey Land and Cattle Company vs. Miller and Lux, 152 Fed. 11.
Anderson vs. Bassman, 140 Fed. 14.
Willey vs. Decker, 73 Pac. 210.
Conant vs. Deep Creek Company, 66 Pac. 188.
Pine vs. Mayor of New York, 112 Fed. 98.
Holyoke Water Co. vs. Connecticut River Co., 20 Fed. 71.
Rutz vs. City of St. Louis, 7 Fed. 438.
Opinion of the Attorney General, 4th Am. Law Register, 385.
New Hampshire vs. Louisiana, 108 U. S. 76, 90.
Perkins County vs. Graff, 114 Fed. 441.

For the rulings and holdings of the above courts particularly applicable in the decisions cited, we respectfully refer the court to our brief in the Circuit Court of Appeals, Ninth Circuit, which is herewith presented.

All through the opinion of the Supreme Court of the United States in the case of

Kansas vs. Colorado, 206 U. S. 46,

runs the doctrine that the legal rights of the parties must prevail, and recognizes the right of appropriation for beneficial irrigation. The illustration of the learned Judge who wrote the opinion, in which he supposes the controversy between two individuals to upper and lower riparian owners in a little stream reiterates the doctrine for which we contend that he who is first in time is first in right, when the court says:

> "The question would be one of legal right, narrowed to place, amount of flow, and freedom from pollution."
>
> Idem, 27 Supreme Court Reps. p. 668.

And again the court says:

> "As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation * * * she cannot complain if the same rule is administered between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation."
>
> Idem. 27 Sup. Ct. Reps. p. 670.

The above citation of authorities involves contests over interstate streams between Nevada and California, Wyoming and Montana, Wyoming and Colorado, Idaho and Utah, Connecticut and New York, Massachusetts and Connecticut, Illinois and Missouri, Pennsylvania and New York, Nebraska and California. All of these cases have universally sustained the right of a prior appropriator in one state

against the junior appropriator in another state to the waters of an interstate stream. The learned counsel for the petitioners have been unable to cite a single authority in support of their position. We have been unable to find any that would sustain their contention. We cannot believe that this court will interfere with the decision of the Circuit Court of Appeals and thereby overturn prevailing and existing rights, but will rather follow the doctrine in force in all of the states that he who is first in time is first in right regardless of state lines.

II.

CROW INDIAN RESERVATION.

Counsel for petitioners contend that

> "The Wyoming appropriators should have no priority because Montana citizens were denied an opportunity to appropriate in their state because of the existence of the Crow Indian Reservation."

Counsel further state in their brief, page 19:

> "It would appear that the Circuit Court of Appeals overlooked this feature of the case, as the opinion makes no mention of it, though purporting to enumerate the various questions presented by the appellants."

We cannot agree with counsel for petitioners that the Circuit Court of Appeals overlooked this question, for we find an express adjudication upon this matter at the bottom of page 653, in the opinion of the court in the case of Bean vs. Morris, 159 Fed., from which we quote:

> "2. It is also urged that complainant's appropria-

tion was invalid, because at the date of the initiation of his claim the head waters of Sage Creek were within the limits of the Crow Reservation in the State of Montana; that the complainant's appropriation conferred no right upon him as against the Indians of that reservation; and that appellants have succeeded to all rights of such Indians by their settlement upon the lands then occupied by such Indians. We think a complete answer to this contention is found in the opinion of the learned Judge presiding in the Circuit Court, in which he said:

'When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, and, assenting for the sake of argument to the theory of the defendants, all that was in the way of the validity of the prior appropriations had been removed, and the appropriators in Wyoming were in point of time ahead of any claim which the defendants could possibily make, because their appropriations attached eo instante * * * The rights of the defendants attached as settlers after the lands were made subject to settlement. They cannot antedate settlement made by them. At that time prior appropriations had been made by the complainant and intervener, and defendants took their riparian rights subject to and charged with those appropriations.'"

The Crow Indians had no riparian rights. The Indians living upon the reservation were wards of the United States Government and did not own the lands upon which they were living. Their right to the lands of the Crow Reservation was only that of occupancy, the *fee* to the land always remaining in the United States.

Beecher vs. Weatherby, 95 U. S. 525.
Johnson vs. McIntosh, 8 Wheat. 543.
United States vs. Cook, 19 Wall. 591.
Clark vs. Smith, 13 Pet. 195.

Mr. Justice Field said in the case of Beecher vs. Weatherby, supra, p. 525, that

> "The propriety or justice of their action toward the Indians were in respect to their lands not a question of Governmental policy and is not a matter open to discussion in a controversy between third parties, *neither of whom derive their title from the Indians.*"

When the Indians ceded these lands on the Crow Reservation, now occupied by appellants, to the United States, the right of occupancy of the Indians, the only right they held, was extinguished and ceased to exist. The land then became open, public domain; "possession, when abandoned by the Indians, attaches itself to the fee without further grant."

Johnson vs. McIntosh, supra.

No riparian rights, if any, of the Indians then attached, it was the same as if the Indians had never occupied the lands. All that was in the way of the validity of the prior appropriators in the waters of streams rising on the reservation, if there was anything, was removed, and the rights of all those who had appropriated from such streams attached eo instante.

III.

CITIZENSHIP OF INTERVENER HOWELL.

Counsel for petitioners allege this as another most important point which, they say, was apparently inadvertently neglected by the Circuit Court of Appeals, and state that it is conceded that the intervener Howell is a citizen of Montana, and that no attempt was made to show that at the time of filing his petition, or at any time since he resided in Wyoming. In this counsel is also in error, as they

are when they state in their petition that T. N. Howell was permitted to intervene over the objections of petitioners, when the record shows that a copy of the petition in intervention was acknowledged "and consent given to said intervention in this cause." (Tr. p. 68). This is ~~cited~~ signed by George W. Pierson as solicitor for J. N. Bean, W. R. Bainbridge, S. W. Bent, Wallace Bent and Corbett Bennett, the very parties for whom the same counsel now appear as petitioners.

T. N. Howell swears in his petition in intervention that he is now, and for twelve years past, has been a citizen of the United States and of the Territory, now State, of Wyoming. We find in the testimony from the receipt issued by the Receiver of the United States Land Office at Lander, Wyoming, that Thomas N. Howell was at that time a resident of Bighorn County, State of Wyoming (Tr. p. 308). The sworn statement of the claim to water gives the post office address of Howell as Lovell, Wyoming (Tr. p. 306). So that it is not conceded that Howell is a citizen of Montana, and proof was introduced to show that at the time of the filing of his petition, and since, he was a citizen of Wyoming.

However, it is immaterial in this case whether he is a citizen of Montana or of Wyoming. The court below having once acquired jurisdiction by reason of diverse citizenship of the complainant Morris and of the defendants, it was not error to permit Howell to intervene to protect his rights regardless of his citizenship.

Conwell vs. White Water Valley Canal Co., Federal Cases No. 3148.
Osborn & Co. vs. Barge, 30 Fed. 805.
Belmont Nail Company vs. Columbia Iron and Steel Co., 46 Fed. 336.

IV.

AMOUNT IN CONTROVERSY.

It was alleged in the bill of complaint that the amount involved in this action exceeded the sum of $2,000.00 exclusive of interest and costs. The Act of Congress of March 3, 1891, conferred jurisdiction upon Circuit Courts of the United States in suits in which there is a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.00. In this action there is a controversy between citizens of Wyoming on the one side and citizens of Montana on the other side, and the water, or thing in dispute, is the waters of the Wyoming appropriators. The jurisdiction, then, rests upon the value of the water right of the complainant Morris, who, as a citizen of Wyoming, instituted the action. The petitioners, as defendants in the court below, deny in their answer that the amount in dispute exceeds the sum of $2,000.00. There was a straight issue, then, of fact as to whether the water right, the thing in dispute, did exceed the sum or value of $2,000.00. If it did, the Circuit Court had jurisdiction. Some eight witnesses testified as to the value of the water rights of Morris and Howell respectively. From their testimony it appears that the value of the Morris water right is from $3,200.00

to $4,800.00, and the value of the Howell water right is from $4,000.00 to $6,000.00. The court below found the value of the water right of Morris to be $3,200.00 and the value of the water right of Howell to be of like amount. The learned lower court was therefore correct in finding that the amount in controversy in this suit exceeded $2,000.00 and the amount involved was ample to sustain the jurisdiction of the court.

Rayney vs. Herbert, 55 Fed. 443.
Miss. & Mo. R. Co. vs. Wood, 67 U. S. 485.
Stinson vs. Dousman, 20 How. 461.

The question as to the jurisdiction of the court upon the amount involved, and as to the citizenship of the intervener Howell, being simple and plain, and so clearly and overwhelmingly in favor of the respondents, there was no need for the Circuit Court of Appeals to take the matters up and discuss them in its opinion, and they are sufficiently answered when the court says that other questions argued by the appellants do not require discussion. It is sufficient to say we find no error in the record.

We respectfully submit that the law clearly upholds and sustains the contention of respondents and that the decree of the Circuit Court of Appeals should not be reviewed, but should be allowed to stand.

Respectfully submitted,

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